IN THE

Supreme Court of the United States

October Term, 1977

No. 77-144

STATE OF ARIZONA,

Petitioner,

v.

PHELPS DODGE CORPORATION,
a New York corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States District Court for the District of Arizona is reported at 390 F. Supp. 150. The opinion of the Court of Appeals for the Ninth Circuit is reported at 548 F.2d 1383.

RESPONDENT'S STATEMENT OF THE CASE

Phelps Dodge Corporation, respondent (hereinafter "Phelps Dodge"), brought this quiet title suit for the purpose of voiding a purported reservation of minerals by the petitioner, State of Arizona (hereinafter "Arizona"), affecting certain lands owned by Phelps Dodge. The suit was filed in the

Superior Court of Maricopa County, Arizona, but was removed by Arizona to the United States District Court for the District of Arizona (R. 1).*

The district court found that the controversy arose in part upon a construction and interpretation of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by Act of June 26, 1936 (49 Stat. 1976), 43 U.S.C. § 315g (c) and (d), that the amount in controversy exceeded the value of $10,000.00, exclusive of interest and costs, and that the district court had jurisdiction of the case under 28 U.S.C. § 1441(b) and 28 U.S.C. § 1331(a). 390 F. Supp. at 151-153. After a trial to the court sitting without a jury, the district court entered judgment quieting title to the mineral estate in the lands in Phelps Dodge.

Arizona appealed from the judgment to the United States Court of Appeals for the Ninth Circuit. That court affirmed the judgment of the district court.

Arizona has petitioned the Supreme Court of the United States for a writ of *certiorari* to the court of appeals.

QUESTION PRESENTED

Are there special and important reasons to review the decision of the court of appeals in this case on writ of *certiorari*?

RESPONDENT'S STATEMENT OF FACTS

Phelps Dodge, which is a corporation organized and existing under the laws of the State of New York and qualified to transact business in the State of Arizona, owns the

*"R." refers to the record, and "T" to the transcript, filed with the court of appeals.

property which is the subject of this suit. Arizona claims an interest adverse to Phelps Dodge in the property, consisting of three parcels (hereinafter called the "Lands").

Phelps Dodge is also the owner of what is sometimes called the Dos Pobres ore body located in the Lone Star Mining District, Graham County, Arizona, northeast of the town of Safford. The Dos Pobres ore body lies approximately one mile from the nearest parcel of the Lands. Phelps Dodge has been testing and developing the Dos Pobres ore body since its discovery in 1957, and is proceeding with mine development and plant construction. Incident to such development and construction, Phelps Dodge has begun sinking three shafts on one parcel of the Lands which, when completed, will be approximately 2500 feet deep and will serve as the principal haulage ways and production shafts for the mining of the Dos Pobres ore body. Various shop buildings and other facilities have been built or are under construction on the Lands. Eventually a concentrator will be constructed there. When completed, Phelps Dodge's plant and facilities on the Lands will represent an investment of 150 to 175 million dollars. 390 F. Supp. at 152.

Phelps Dodge has no interest in any of the Lands for their mineral value or content, and intends to make only nonmineral use of the Lands in connection with its mining of the Dos Pobres ore body. Facilities and improvements of the type planned by Phelps Dodge on the Lands would never be placed on lands which are known or which are suspected to be mineral in character (T. 27-28).

Although the Lands are nonmineral in character, Phelps Dodge nevertheless desires to quiet title to the mineral estate in the Lands. It seeks to avoid harrassment and disruption

of its nonmineral use of the Lands by persons purporting to explore for minerals under prospecting permits issued by Arizona under the color of its purported mineral reservation (T. 28). This concern proved to be justified when Essex International, Inc. filed an application for prospecting permit on the most critical parcel of the Lands. When the Arizona State Land Department declined to issue the permit because of a temporary restraining order entered in this case, Essex intervened, contending that the State Land Department was powerless to refuse to issue a mineral exploration permit on state lands open to mineral entry (R. 21). Essex subsequently withdrew from the case after its motion for summary judgment was denied (R. 311).

The Lands were originally granted to Arizona by the United States as school trust lands pursuant to § 24 of the Arizona Enabling Act (36 Stat. 557). 390 F. Supp. at 152. This provision granted to the state, sections two, sixteen, thirty-two and thirty-six in every township in the state for the support of its public schools. The grant became effective upon admission to statehood if the section had been previously surveyed, or, if not, upon approval of the survey thereof. Section 28 of the Enabling Act prescribed the conditions upon which the school trust lands could be disposed of by the state.

By the Act of June 28, 1934, 43 U.S.C. § 315, *et seq.*, (48 Stat. 1269), the United States Congress passed the Taylor Grazing Act, which among other things, authorized the exchange of lands by the United States for lands owned by a state. The act provided that a state could seek an exchange of its lands for federal lands either on an equal acreage basis or on an equal value basis. 43 U.S.C. § 315g(c). In

1936, Congress amended Section 28 of the Arizona Enabling Act (49 Stat. 1477) to authorize Arizona to dispose of school trust lands by exchange under such regulations as the legislature might prescribe.

In 1945, prior to the enactment of such regulations, Arizona reconveyed the Lands to the United States pursuant to a Taylor Grazing Act exchange based on equal acreage under 43 U.S.C. § 315g(c). This "deed of reconveyance" contained a purported reservation of minerals in favor of Arizona, and it is the invalidity of that mineral reservation which Phelps Dodge established in this suit. 390 F. Supp. at 152.

Phelps Dodge acquired the Lands from the United States through a private Taylor Grazing Act exchange pursuant to 43 U.S.C. § 315g(d) by patent dated February 3, 1969. 390 F. Supp. at 152

SUMMARY OF ARGUMENT

1. The decision of the Court of Appeals for the Ninth Circuit is not in conflict with the decision of another court of appeals on the same matter.

2. The decision below has decided a state question completely in accordance with applicable state law.

3. The only federal question involved in the case is the interpretation of § 315g of the Taylor Grazing Act and is not of sufficient importance to merit review by the United States Supreme Court inasmuch as the statute has been repealed.

4. The questions decided by the district court and court of appeals are based upon facts unique to this case.

ARGUMENT OF REASON NO. 1 FOR DENYING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit does not conflict with the decision of another court of appeals on the same matter. Arizona cites *Wier v. Texas Co.*, 180 F.2d 465 (5th Cir. 1950), as a conflicting decision of another court of appeals on the issue of estoppel by deed. In *Wier*, the court had before it deeds to privately owned lands between parties acting in their individual capacities. The court sought to determine the intention of the parties to the pertinent deeds, and then determined and applied the estoppel law of Louisiana, the state in which the land was situated. The *Wier* case clearly did not involve the same issue of estoppel as was presented to the Court of Appeals for the Ninth Circuit in this case. Here the court was dealing with a patent issued on government lands by a government agency with respect to which there can be no negotiations. The exception to the rule of estoppel by deed involved here is a question of Arizona law which the court determined and applied.

Arizona also cites *United States v. Price*, 111 F.2d 206 (10th Cir. 1940), for the proposition that the decision below is in conflict with the decision of another court of appeals on the same matter. The *Price* case considered the question of whether a patent was regular on its face so that resort could not be had to antecedent proceedings, or whether the patent was irregular on its face so that antecedent proceedings could be examined. The court found that it was regular on its face because the patent contained a general recital of the statutory authority for its issuance, which included both the Enlarged Homestead Act (no mineral reservation required) and the Stock-Raising Homestead Act (mineral

reservation required). Consequently, the patent did not disclose any irregularity on its face, and the general rule precluding resort to the antecedent proceedings was applicable.

In the instant case, the court of appeals simply held the deed in question to be irregular on its face, stating:

> "The district court held, and we agree, that the deed of reconveyance between Arizona and the United States was irregular on its face as it contained a mineral reservation in land that was not mineral in character and also that the reservation was made at a time when any such reservation was *per se* beyond the power of the officers of the State of Arizona." 548 F.2d 1383 at 1386.

The court in *Price* tacitly recognized the principle that a court may inquire into antecedent proceedings on which a patent irregular on its face is founded, but held, based on the facts of that case, that the deed was regular. *Price* is clearly distinguishable on its facts and did not involve the same matter as was presented to the Court of Appeals for the Ninth Circuit in this case.

ARGUMENT OF REASON NO. 2 FOR DENYING THE WRIT

The court of appeals has decided a state question in accordance with applicable state law. The principle of estoppel by deed and the exceptions to such principle are issues central to the decisions of the district court and the circuit court of appeals in this case. This principle of property law is a question of state law and, far from deciding the question in a way that would conflict with applicable state law, the district and circuit courts scrupulously adhered to the law of Arizona as applicable to the facts in this case. The highest court of Arizona has twice held that the grantee or its assignee is not estopped to attack the

invalidity of a mineral reservation wrongfully inserted in a patent from the State of Arizona. *Campbell v. Flying V. Cattle Co.*, 25 Ariz. 577, 220 P. 417 (1923); *State v. Drew*, 83 Ariz. 91, 316 P.2d 1108 (1957). Arizona asserts that *Allison v. State of Arizona*, 101 Ariz. 418, 420 P.2d 289 (1966), somehow changed the law of Arizona as enunciated in the earlier *Campbell* and *Drew* cases. However, the circuit court correctly disposed of that contention in a footnote, stating:

> "While appellant cites to *Allison* as reversing the earlier *Campbell* and *Drew* decisions, such interpretation definitely misreads that case. In *Allison*, which involved rights of way for highways and not mineral reservations, the Arizona Supreme Court recognized 'a line of cases which hold that a reservation inserted in a patent by an administrative officer without statutory authority is void.' However, the Court held that the patents in *Allison* did not fall within the rule established in that earlier line of cases, as the officer there was clearly authorized to reserve rights of way for highways in the land." 548 F.2d 1383 at 1386, n.5.

ARGUMENT OF REASON NO. 3 FOR DENYING THE WRIT

Although the case also presented a substantial federal question, the question involved the interpretation of a statute which has been repealed. Involved here was an interpretation of the exchange provisions of the Taylor Grazing Act (48 Stat. 1269), 43 U.S.C. § 315, *et seq.*, found in §§ 315g(c) and 315g(d). The precise question presented is whether in an exchange based on equal acreage (as distinguished from an exchange based on equal value) a state may reserve minerals when the land conveyed by the state is not mineral in character. This question is apparently one of first instance.

However, its importance as a proposition of general applicability is substantially diminished in view of the repeal by Congress of § 315g of the Taylor Grazing Act by § 705(a) (90 Stat. 2792) of the "Federal Land Policy and Management Act of 1976". Public Law 94-579, 90 Stat. 2743 to 2794. The repeal during the pendency of the case of the statutory basis for the sole federal question involved (while not affecting the applicability of the statute to this case) undeniably destroys any substantial importance which the issue might otherwise have. In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955), a petition for writ of *certiorari* was dismissed as being improvidently granted where a state statute had been enacted to correct the situation involved in the case. Here, the converse is true. The statute giving rise to the federal question has been repealed.

ARGUMENT OF REASON NO. 4 FOR DENYING THE WRIT

The questions decided by the court of appeals are based upon facts unique to this case. It is unlikely that all of the circumstances found here would be presented in another case. For instance, there must have been a state exchange based on equal acreage rather than equal value; the deed conveying the lands must be irregular on its face; state law must recognize the exception to the rule of estoppel by deed relied on herein; and the land must be demonstrated to be nonmineral in character.

The case would appear to be within the purview of Mr. Justice Frankfurter's opinion in *Rice v. Sioux City Cemetery, supra*, that:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." 349 U.S. 70 at 74, 99 L. Ed. 897 at 901.

The fortuitous concurrence of circumstances giving rise to this case may be correctly characterized as "episodic".

CONCLUSION

Arizona has failed to show special and important reasons warranting the exercise of the Court's judicial discretion to grant a review of the circuit court's decision on writ of *certiorari*. The petition should be denied.

Respectfully submitted,

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